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No. 00-958

In The

Supreme Court of the United States

POWERSCREEN OF AMERICA, INC., POWERSCREEN OF WASHINGTON, INC., POWERSCREEN OF NORTHERN CALIFORNIA, INC., AND POWERSCREEN INTERNATIONAL DISTRIBUTION, LTD.,

Petitioners,

v.

CONSTRUCTION EQUIPMENT COMPANY AND ROGER G. SMITH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners (collectively "Powerscreen") misstate the question presented to this Court. Respondents (collectively "CEC") will briefly demonstrate herein that the sole issue presented by this Petition is simply whether there is sufficient evidence to support the jury verdict that the invention was not on sale more than one year before the filing date. *Tech Air Inc. v. Denso Mfg. Michigan Inc.*, 192 F.3d 1353, 1358-59 (Fed. Cir. 1999). It is undisputed that a complete drawing of the device existed prior to the critical date. However, the jury found that the CEC salesman, Mr. Rehmke, had not received the drawing, a written description or pricing information about the patented unit prior to the critical date (Interrog. Nos. 5, 6 and 7; J. App. 0014-15) and that CEC had not quoted a price or arranged a demonstration of the unit prior to the critical date (Interrog. Nos. 8 and 9; J. App. 0015). Because the case of *Pfaff v. Wells Electronics, Inc.*, 528 U.S. 55, 119 S.Ct. 304, 142 L.Ed.2d 261 (1998) requires a pre-critical date offer for sale, and there was no such offer here, *Pfaff* is not relevant to this petition.

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STATEMENT OF THE CASE

CEC objects to the three introductory paragraphs to Powerscreen's statement of the case. The sole issue presented by this petition is simply whether there is sufficient evidence to support the jury verdict that the invention was not on sale more than one year before the filing date. *Tech Air Inc. v. Denso Mfg. Michigan Inc.*, 192 F.3d 1353, 1358-59 (Fed. Cir. 1999). The issue in *Pfaff v. Wells Electronics, Inc.*, 528 U.S. 55, 199 S.Ct. 304, 142 L.Ed.2d 261 (1998), was whether drawings can render the invention sufficiently developed to be offered for sale, even though the device itself was not yet fabricated. *Pfaff* answered that question in the affirmative. However, in the present case it is undisputed that a complete drawing of the device existed prior to the critical date and that this drawing contained " 'sufficient clearness and precision to enable those skilled in the matter' to produce the device." *Pfaff, supra*, 525 U.S. at 63 (citation omitted). Therefore, *Pfaff* is not relevant to this petition.

While it is not normally the province of the Supreme Court to review factual findings, CEC will demonstrate that there is substantial support for the jury's verdict that, prior to the critical date, this drawing was not even presented to Mr. Rehmke, the CEC salesman who allegedly offered the unit for sale prior to the critical date. The brief will also show that there is substantial evidence to support the jury's verdict that CEC had not quoted a price or arranged a demonstration of the patented unit prior to the critical date. Therefore, the Court's ruling that the patent was not invalid was clearly appropriate.

A. Proceedings Below

CEC concurs with Powerscreen's explanation of the proceedings below.

B. There is Support in the Record for the Verdict that Mr. Rehmke Had Not Received the Drawing Prior to the Critical Date and That CEC Had Not Offered the Unit for Sale Prior to the Critical Date

Powerscreen contends that CEC placed the invention on sale more than one year prior to the July 24, 1992 filing date when Mr. Rehmke, a disgruntled former employee who was a CEC salesman in 1991, allegedly offered the unit for sale to Red-E Trucking ("Red-E"). However, the jury ruled that Powerscreen had not proved that Mr. Rehmke received either the drawing, a written description or pricing information about the patented unit prior to the critical date (Interrog. Nos. 5, 6 and 7; JA0014-15) or that CEC had quoted a price or arranged a demonstration of the unit prior to the critical date (Interrog. Nos. 8 and 9; JA0015). There is substantial support in the record for this verdict.

Mr. Rehmke testified that on June 10, 1991, he received a drawing and product description of the Screen-It from CEC (JA2462-2464). Roger Smith, the inventor, stated that these materials would not have been provided to Mr. Rehmke until after August 5, when the machine had been first tested or demonstrated at the

Leahy Pit[1], two weeks after the July 24 bar date (JA2427-2428). Roger Smith and Gary Smith (President of CEC and Roger's son) testified that Roger told Mr. Rehmke, Gary and others that they were not to talk with customers about the Screen-It until the Screen-It had been tested and was ready to go (JA2426-2427; 2573-2574; 2522-2578).

Mr. Rehmke testified that prior to the August 7 demo at Red-E, he "would have" provided the alleged June 10 Screen-It documentation to Mr. Steiger at Red-E (JA2484); but Mr. Steiger testified that Red-E did not receive any documentation about the Screen-It prior to the demonstration (JA2563).

As to when the August 7 Red-E demo was arranged, Mr. Rehmke testified that he would have set it up by July 22, 1991 (JA2469-2470). However, Rehmke testified he was relying on his records (JA2545), but the July 22 call report he relies on does not say anything about a demo at Red-E (JA2875). Mr. Steiger testified that while he did not recall precisely when Mr. Rehmke called to set up the demo, he knew it "wasn't too much in advance. I mean, there has got to be time for – to get the machine up, to get it trucked up here, and so on." (JA2565). There is a note in Mr. Rehmke's Daytimer that he spoke with Mr. Steiger on August 6, the day after the demo at Leahy Pit and the day before the demo at Red-E (JA2543-2544). This was in

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[1] The Leahy Pit demo was the first time CEC had set up a Screen-It and run it. JA2422. Powerscreen does not contend this demo was an offer for sale.

plenty of time to transport the Screen-It from the Portland metropolitan area to Red-E, which is located in Redmond, Washington (JA2589), southeast of Seattle.

Gary Smith and Mr. Rehmke agreed that Rehmke could not have provided a price to a customer without Gary first giving him the price (JA2492-2493; 2549; 2574). Gary testified that the first time he provided Mr. Rehmke with a price was in the August 20-26 time frame (JA2574-2575; 2837-2842). (PX 43 and 44 (JA2837-2842) are communications between Mr. Rehmke and Gary Smith regarding the price quote).

Mr. Rehmke testified that he kept detailed records of his conversations with customers and with the CEC office. Those records were kept in three forms: spiral notebooks; weekly call reports; and Daytimers (JA2451-2455). Mr. Rehmke used his call reports and spiral notebooks to keep a record of price quotes he was providing to customers (JA2451; 2495; 2540). During cross examination, CEC's counsel took Mr. Rehmke through his call reports, spiral notebooks and Daytimers (JA2496-2556), but despite the many entries regarding communications with CEC, there were no entries concerning a drawing or product description allegedly received by Mr. Rehmke on June 10, 1991 (JA2501; 2540-2541). Nor was there any reference to a price being provided to Mr. Steiger until the August 23, 1991 quote (JA2513-2514; 2537; 2548-2549). Mr. Rehmke admitted that after August 23, there were many references to prices and quotes regarding the Screen-It (JA2520). See, e.g., JA2517-2518.

Accordingly, there is substantial evidence to support the jury verdict that the invention was not on sale more than one year prior to the filing date. The district court's subsequent ruling that the patent was not invalid was therefore the only appropriate way that issue could have been decided.

SUMMARY OF ARGUMENT

The *Pfaff* case is not relevant to this petition. *Pfaff* dealt with the issue of whether the invention was sufficiently complete to be offered for sale. There is no dispute in the present case that Roger Smith developed drawings of the invention long prior to the critical date, and that at that point the invention was sufficiently complete to have been offered for sale. However, *Pfaff* requires the invention to be the subject of a commercial offer for sale prior to the bar date. 142 L.Ed.2d at 272. There is substantial support in the record for the jury verdict that the patented unit was not offered for sale prior to the bar date. Therefore, there is no reason for the Supreme Court to grant this petition for certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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